[Unapproved and Subject to Change]
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

November 3, 2005

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 10:02a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Phil Blair, Sheridan Downey, Eugene Huguenin, and Ray Remy were present.

Item #1. Public Comment.

There was none.

Consent Items #2-5.

Chairman Randolph pulled Item #2, the approval of the October 12, 2005, minutes and asked if there were any other items to be pulled.

There were none.

Commissioner Huguenin moved to approve the following items in unison:

Item #3. In the Matter of Prop38yes.com, School Vouchers, and Betty Presley, FPPC No. 03/050. (12 counts).

Item #4. Failure to Timely File Major Donor Campaign Statements.

a. In the Matter of Fired Up, Inc., FPPC No. 05-0470. (1 count).

Item #5. Failure to Timely File Late Contribution Reports – Proactive Program.

a. In the Matter of Jay Snyder, FPPC No. 05-0550. (2 counts).

b. In the Matter of Tracy Snyder, FPPC No. 05-0551. (1 count).

c. In the Mater of American Civil Liberties Union of Northern California, FPPC No. 05-0555. (1 count).

d. In the Matter of Gillin, Jacobson, Ellis & Larsen, FPPC No. 05-0560. (1 count).

e. In the Matter of Long Beach Memorial Medical Center & Miller Children's Hospital, FPPC No. 05-0565. (2 counts).

f. **In the Matter of Mitchell D. Kapor, FPPC No. 05-0567.** (1 count).

g. **In the Matter of Murray & Howard, LLP, FPPC No. 05-0568.** (1 count).

h. **In the Matter of U.S. Bancorp, FPPC No. 05-0575**. (1 count).

i. **In the Matter of Robinson, Calcagnie & Robinson, Inc, FPPC No**. **05-0572.** (1 count).

Commissioner Downey seconded the motion. Commissioners Downey, Blair, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

ITEM REMOVED FROM CONSENT

Item #2. Approval of the October 12, 2005, Commission Meeting Minutes

Chairman Randolph began noted the first change needing to be made in the meeting minutes on page one on Item #8. The word 'Retired' should not be there, as it is a repeat from the previous agenda item.

Commissioner Remy had a change on page 9 in the fifth paragraph. The comments in that paragraph were not made by Commissioner Huguenin, but were actually made by Commissioner Remy.

Commissioner Remy moved to approve the minutes as changed. Commissioner Downey seconded the motion. Commissioners Downey, Blair, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 5-0 vote.

DISCUSSION ITEMS

Item #6. Discussion: Draft Request for an Advisory Opinion from the Federal Election Commission Regarding Preemption of State Rules for Reporting Mixed Expenditures by Political Party Committees on Federal and State or Local Elections.

Larry Woodlock, Senior Commission Counsel addressed the Commission regarding the regulation to govern the reporting of certain campaign receipts and expenditures by California political party committees. Charles H. Bell, of Bell, McAndrews & Hiltachk, LLP, and Lance Olson, of Olson, Hagel, & Fishburn, LLP, argued that federal law might preempt any such regulation. The Commission has suspended discussion of the regulation and directed staff to draft a letter to the FEC asking for their opinion on the matter. Mr. Bell and Mr. Olson submitted comment letters containing criticisms of that draft. In addition, April Boling phoned in to take issue with some of Mr. Bell's comments. Thus, there is some division of opinion among the regulated community. Mr. Bell and Mr. Olson argued in effect that the Boling letter

was unnecessary. Ms. Boling could not address the Commission but was listening in via the phone.

Mr. Woodlock stated that the draft letter set out the Commission's regulatory goals in general terms and seeks general advice from the FEC on its views of preemption in this area. According to Mr. Bell there is no need for California to second guess federal allocation formulas or to require duplicate reporting from over burdened treasurers. He argued that it is neither possible nor desirable to regulate in this area. Mr. Bell recommends at a minimum that the letter be redrafted with more specificity. He notes that the interplay between federal and state law is sufficiently complex and that it is unlikely that the FEC will tolerate any state regulation in this area unless it is clear that the proposed state rules would not affect federal rules in any way. Mr. Olson proposed that the Commission do without any regulation at all simply by advising the political party committees that they report federal expenditures on state and local campaigns on Schedule D of FPPC Form 460. This would avoid the preemption question altogether.

Mr. Woodlock explained that staff sees a problem with that because Schedule D permits lump sum reporting, but it does not permit attribution of that lump sum among contributors to the federal committee. As a result of not having that information, the Commission cannot police the state or local contribution limits because it is not clear what the ultimate source of that money was. Staff recommends that the letter be redrafted with a greater degree of specificity to minimize the likelihood that the FEC will preempt the proposed regulation altogether, as that is a possibility. Writing the letter more carefully may limit the chances of that happening. Mr. Woodlock noted that the alternative is to go with Mr. Olson's suggestion which is to dispense with the whole process and settle for reporting on Schedule D.

Commissioner Downey sought to clarify that the reason the regulation was proposed in the first place is tied to the Commission's contribution limit concerns and the allocation provisions that were in that proposed regulation, and that this reason was still the purpose for the regulation.

Mr. Woodlock confirmed that the purpose for the regulation is still the same but additionally, the Commission wants to know how much federal money is being spent. The point of April Boling's letter was to be informed of how much money was spent on state activities. The Olson proposal would not allow for the information regarding federal expenditures.

Commissioner Downey posed that if the Commission eventually gets a regulation which requires the allocation among the federal contributors, could there be situations where those contributors truly innocently have exceeded the contribution limits, once the allocation formulas are proposed. More importantly, the recipient candidate would not know ahead of time what the allocation might be.

Mr. Woodlock directed the Commission to the draft regulation which included a specific provision, subdivision (c), designed to prevent a trap for the unwary.

Commissioner Downey opined that the Commission should still get an opinion from the FEC because necessary to be aware of the FEC's position. The suggestion to redraft the letter with more specificity sounds appropriate.

Chairman Randolph agreed with Commissioner Downey that it is necessary to draft a more specific request with some of the concepts that are in the regulation set out so the FEC has an idea of what is being addressed. If the FEC says that the Commission is preempted then the other option is to go back to the concept of looking at doing reporting on Schedule D in conjunction with the hard and soft money regulation that the Commission is currently working on. This would address some of the worst case scenarios in terms of protecting the contribution limits. Therefore, revising the letter with more specific bullet points would be a good idea.

Chairman Randolph added that it is important to give everyone who would like to comment on this issue, the opportunity to do so. Readdressing this issue in December would allow for anyone who was not able to speak today, the chance to express their opinions next month.

Chairman Randolph asked if there was any public comment.

There was none.

The Commission agreed to bring this item back for discussion in December.

Item #7. Pre-Notice Discussion of Proposed Regulation 18361.10 - Designation of Certain Adjudicated Decisions as Precedent.

Andreas Rockas, Legal Division Counsel, explained that the proposed regulation would set out guidelines and procedures through which the Commission might increase the consistency, predictability, and uniformity of its adjudicated decisions by facilitating the creation of a body of agency "case law." The great majority of violations of the Political Reform Act prosecuted by the Commission are done so through administrative hearings. These hearings are most often conducted before administrative law judges (ALJ's) outside the agency by the Office of Administrative Hearings. After a hearing, these ALJ's issue proposed decisions which are sent to the Commission for adoption, modification and adoption, or rejection of the proposed decision and the Commission would try the case itself. The enforcement division reports that at times, the ALJ's unfamiliarity with the Act leads to inconsistent results and, therefore, a lack of predictability regarding how the Act will apply in any particular case. Under the Administrative Procedure Act (APA) the Commission possesses the power to deem certain decisions as precedent but has never done so. Currently, and since its creation, the Commission has utilized two basic methods to directly issue policy statements and interpretations regarding the Act. One method is through the issuance of regulations, and the second is through the issuance of formal opinions. The proposed regulation would provide the Commission with a framework through which it might begin to designate all or parts of future administrative enforcement decisions as having precedential value. Such precedent could be cited as binding authority in arguments made to ALJ's and as persuasive authority to both state and federal judges interpreting the statutes and regulations comprising the Act. The proposed regulation currently consists of six subdivisions, (a) through (f). Except for subdivisions (d) and (e), much of the language in the regulation is taken from the APA. Subdivisions (d) and (e) propose one specific procedural process the Commission might follow in considering whether to designate all or part of a

decision as precedential. Decision Point 2 is whether some version of subdivisions (d) and (e) should be included in this regulation at all.

Subdivision (a) lays out the scope of decisions to which the regulation would apply, that is, administratively adjudicated enforcement decisions. Therefore, for instance, stipulated settlements could not be deemed precedent. Subdivision (a) also describes the APA standard a decision must meet before it can be deemed precedent.

Commissioner Downey asked if there were any indication that the Commission would be limited in its review of prior adjudicated decisions as precedential.

Mr. Rockas replied that there would not be limitations on the Commission referencing prior adjudicated decisions, however, currently the proposed regulation does not contemplate reviewing past decisions.

Mr. Rockas continued that subdivision (a) also contains Decision Point 1, which deals with who should be allowed to present input regarding whether decisions should be deemed precedent. Such input could be limited to the parties only or could be open to the general public. As discussed in the memo regarding this regulation, staff has not discovered any authority directly on point regarding open meeting requirements incumbent on the Commission require public input on whether a decision should be deemed precedent. Though enforcement division staff believes public comment should not be required, the legal division staff believes that discussions about precedent designation should be conducted openly with input from both of the parties to the action and the general public. Therefore the enforcement division believes that the regulation should refer to "parties" as the only group whose argument should be considered, whereas the legal division believes the opinions of any person in the general public should be considered as well.

Mr. Rockas went on to subdivision (b) which contains language regarding the indexing of decisions, mostly taken from the APA, and is mandatory. The language which is substantively different is in subsection (b)(2) and mandates that the Commission publish its index on its website in addition to making it available by subscription. Subdivision (c) sets out a list of suggested factors for the Commission to consider in deciding whether to designate or overrule precedent and these factors are not made mandatory by the APA, only suggested.

Subdivisions (d) and (e) comprise Decision Point 2 and are not made mandatory by the APA. These subdivisions set out the suggested process by which input from parties and/or anyone from the public could argue for or against the designation of precedent. Mr. Rockas explained that the enforcement division is opposed to spelling out any such procedures in the regulation itself. Enforcement believes that public input is not required and that such a formalized process would unnecessarily diminish the utility of this proposed regulation. If instead, the Commission is inclined to entertain public input regarding the designation of precedent, legal division staff strongly recommends that some version of the detailed procedures in subsections (d) and (e) be included. Finally subdivision (f) is composed largely of language taken from the APA and is reiterated in the regulation.

Commissioner Huguenin commented that Decision Point 1 was described as having to do with whether or not someone would have the right to have input, but the language of the regulation in the last sentence is subdivision (a) as well as subdivision (e) talks about standing to make the request. If the Commission is going to have a procedure, and that would be preferable, whereby the decision to designate something as precedent would be essentially rule making, or at least a legislative function which the public ought to know of and have an opportunity to address, it is unclear whether or not anyone, person or party, can oblige the Commission to consider designating something as precedent by making a request.

Mr. Rockas agreed that the authorizing statute in the APA is vague in that one sentence classifies the designation of a decision as a precedent decision is not rulemaking and the sentence immediately following says that it is not subject to judicial review, implying that this is a kind of rulemaking or legislative function.

Commissioner Downey expressed that despite what the statute says this seems like rulemaking than anything else, but the statute says that it is not rulemaking so that is not arguable. However, when it comes to adopting the procedures by which the Commission reaches decisions regarding precedent, it can be treated in the same way the Commission treats rulemaking.

Chairman Randolph added in agreement that there is a practical concern that may not come out in the language of the regulation, which is that ordinarily the draft ALJ decision is received and taken into closed session for consideration, and then the Commission's decision is announced. If the Commission would like to have input from other people which, as a policy matter is important, then the regulation has to include in its language that the process is not done all at one time.

Mr. Rockas replied that staff had tried to express that concern in subdivisions (d) and (e) by laying out a type of procedure that explains that there needs to be a decision on the substantive decision of the underlying case before further application of that decision can be discussed.

Mr. Rockas responded to a question from Commissioner Huguenin regarding the wording in the last sentences in subdivisions (d) and (e), and the last sentence in subdivision (a) as to whether they would make it mandatory for the Commission to consider all requests or if the Commission would have the option to decide whether or not to consider them. Mr. Rockas explained that the idea was to present both options to the Commission for decision. The specifics of the process that will be written into the legislation will be written based on the Commission's decision on this matter. If the Commission initially decides that a decision is deemed precedent and there is no response for a period of time, the decision will be deemed precedent. If the Commission does not respond initially, someone who thinks it ought to be deemed precedent could submit a request and that would trigger the specific procedural mechanisms in subdivision (e). At that point the Commission would be obligated to consider it.

Chairman Randolph added that the Commission is obligated to consider these requests, but is in no way obligated to designate anything as precedent. The Commission could go through the factors set forth in subdivision (c) and decide that the request is not precedential material.

Commissioner Huguenin clarified that his concern is that anyone can place a request on the agenda and require that the Commission go through the exercise of reviewing it, rather than the Commission being able to decline the request prior to having gone through the process of review.

Chairman Randolph responded that if the Commission views the requests as part of the open meeting process then it seems to be like any of the proposed decisions brought to the Commission for consideration.

Luisa Menchaca, General Counsel, explained how this particular process differs in terms of how the Commission handles the opinion process. Subdivision (e) is set out so that if an interested person submits the request and files a brief description relating to their request, that description is submitted to the Executive Director, whose role is to place it before the Commission. The Commission then has sixty days to decide whether to designate the decision as precedent. Thus, any person or party can put a request on the agenda for discussion. However, there are a number of factors that are considered with respect to the initial request and if those factors are not met, the Executive Director can deny that request. In that situation the request would never reach the agenda. If the Executive Director does decide that the request does meet the required factors, the request would then be set for the Commission's consideration. This is just one proposal, and it can be refined to add whatever process the Commission would like. The way it is drafted at this time though, anyone who submits the required documents timely can have their request placed on the agenda.

Commissioner Blair wondered how many of the ALJ requests the Commission receives a year.

Mr. Rockas replied that the Commission receives approximately one-half dozen requests a year. The majority of cases are settled by stipulation.

Commissioner Remy said that he is in favor of a certain amount of discretion being given to the Executive Director so that not all of the requests are brought to the agenda. Commissioner Remy suggested that language in subdivision (c) be reviewed to make it clear that the Commission may not necessarily review every request, and that the Executive Director has a greater protection.

Mr. Rockas agreed that the language should be written in a way that does not obligate the Commission to review every request.

Chairman Randolph stated that she likes the notion of adding the intervening Executive Director review so if the Commission would like to come back with this proposal again, and have it include an option for Executive review, that would be a good idea. It does need to be within the same timeframe as set out in subdivision (e).

Commissioner Downey clarified what is proposed is that the Executive Director would essential screen and prevent some of the matters from coming to the Commissioners for review.

Chairman Randolph confirmed that the number of these requests is not very high. The Executive Director review would prevent people who want to continuously bring up the same points over

and over. The language should include some discussion of the required factors in subdivision (c).

Commissioner Blair sought to clarify that any person or party who makes a request for precedent would have to fulfill the requirements and that submission would go to the Executive Director. The facial review by the Executive Director would determine whether the request would go on to the Commission agenda or be denied at the Executive level. Additionally, Commissioner Blair asked if the Commissioners would be notified that a request had been denied.

Ms. Menchaca added that the opinion process does allow for a reconsideration request to be made.

Chairman Randolph read the section of the opinion process pertaining to the request and appeal process, and asked that staff review it to decide what language should be kept.

Commissioner Blair asked is the Executive Director was to decide if the request should be deemed precedent.

Chairman Randolph replied that the Executive Director was only reviewing the request to see if all required factors had been met and then the request would go to the Commissioners for a decision on precedent.

Commissioner Blair wondered if the Commissioners would be notified of any denied request by the Executive Director.

Chairman Randolph said that the Commission does not currently include that in the procedure but it could be added.

Commissioner Blair suggested that the Commissioners be notified of denials so that the Commission is aware of what the public is asking about.

Commissioner Huguenin agreed with Commissioner Blair that it would be good to be aware of denied requests in case there are follow ups.

Commissioner Downey added another suggestion to separate the last sentence in subdivision (d) in to two sentences. The sentence contains two issues but is not clear. One sentence should explain the situation where no petition for reconsideration has been filed and the other sentence should explain the situation where a petition has been filed.

Ms. Menchaca asked if the Commission would like optional language added to allow for the consideration of past decisions.

Chairman Randolph replied that she did not think it was a good idea because the past decisions were discussed by an entirely different group of people.

Commissioner Huguenin added that the idea of a precedential decision has not always existed in the APA and that may be a problem when reviewing past decisions.

Scott Hallabrin, from the Assembly Ethics Committee, addressed the Commission with a question regarding whether the present decision rules would apply to settlements and default decisions.

Chairman Randolph replied that the decisions would definitely not apply to stipulations but was unsure about default decisions.

Mr. Rockas agreed that the decisions would most likely not apply to default decisions.

Chairman Randolph suggested there be language specifying that.

Commissioner Remy questioned whether it would be necessary to go back to look at past decisions that pertained to current legislation.

Chairman Randolph replied that currently the Commission is silent on that issue and asked that language be drafted for consideration.

Mr. Rockas confirmed that what the Commission would like to see is a decision point addressing this issue. He also asked if this issue should come back for pre-notice discussion or if the legislation could be set up for adoption.

Chairman Randolph reviewed the additions that will be added to the regulation and made the suggestion to bring it up for adoption.

Commissioner Downey agreed with the Chairman.

Chairman Randolph said the draft would be brought back in January.

Item #8. Legislative Report.

Whitney Barazoto, Legislative and Communications Coordinator, addressed the Commission with eight legislative proposals for consideration. Proposal number six has been pulled and will be deferred until next year. The first two proposals are technical amendments to eliminate or clarify obsolete references to sections that have been repealed in areas relating to candidate travel reporting and office holder accounts. The third proposal deals with the filing of campaign statements. Currently candidates and committees must file two copies of each campaign statement with the candidate or committee's county of domicile, which is the address where the committee is located. Committees are increasingly hiring professional treasurers and using the treasurer's business address as the address of the committee. Often the treasurer's address is in a county where the committee neither raises funds nor makes contributions or expenditures. This proposal would eliminate the reference to the committee's county of domicile and instead, require the filing of such statements in the candidate's county of domicile. It would also reduce the two copy filing requirement to one copy for local filing officers.

Ms. Barazoto continued with the fourth proposal which would increase the major donor threshold from $10,000 to $25,000. Under current law, when an individual makes contributions of $10,000 or more to candidates or committees, that individual contributor is deemed a committee, subject to all of the filing obligations. Such a contributor is commonly referred to as a "major donor." Because the individual contribution limit to a candidate for governor is $22,500, the current $10,000 threshold means that one who makes a contribution to a candidate for governor triggers the status of committee. Candidates are also required to notify anyone contributing a single contribution of $5,000 or more that the contributor may be, or may become a major donor. However, this notification may not occur which leaves the less sophisticated donors unaware of the requirement. You may notice that on today's agenda items #4 and #5 include major donor violations. All but one of the sub items would not have been brought if the threshold was at $25,000. Commission staff resources saved as a result of the threshold change could instead be spent on other areas of Enforcement.

Ms. Barazoto explained the fifth proposal which would amend the definition of "investment" to specifically exclude defined benefit pension plans. This would codify the Commissions 1978 opinion in *Elmore*, which held that employee payments made to define benefit pension plans are not investments for purposes of the act.

Ms. Barazoto noted that the sixth proposal had been pulled and went on to bill proposal #7, which would create an expedited procedure of obtaining judgment to collect unpaid monetary penalties imposed by the Commission. The current procedure requires the Commission to file a civil action to obtain such a judgment. This proposal would establish a more efficient application process that is consistent with the process used by other agencies. This would reduce the time spent by Enforcement staff to collect these unpaid penalties.

Ms. Barazoto continued with proposal #8 which would amend the act to require that audits shall cover reports and statements that are filed electronically. The audit provisions of the act currently require the FTB and the Commission to audit reports and statements filed under chapters four and six. Proposition 34, however, brought many changes to chapter five, including additional electronic reporting requirements not found in chapters four and six. This bill would add chapter five to the list of chapters to be included in FTB or Commission audits and investigations in order to clarify auditing responsibilities.

Ms. Barazoto explained the last proposal for discussion, proposal #9, which is a response to the Commission's request for legislative amendments regarding "120-day demands" for civil action. The goal of the response is to preserve the right underlying demands for civil action, while moderating the impact of numerous demands on Commission staff and respondents. This proposal would amend the act in the three ways. First, it would limit the number of "120-day demands" that may be filed by any one person or group of persons acting in concert. The proposed limit is capped at no more than ten civil demands within any twelve month period. This is the most direct way to address the problem of individuals filing mass quantities of civil demands. Second, the proposal would also require that a person making a demand upon the Commission must also provide actual and timely notice to the respondent. This may reduce the burden on Commission staff by prompting respondents to come forward early with any evidence

that would eliminate the need for further investigation. The third way this proposal would amend the act is by additionally directing the courts to consider Commission policy as they set penalties for violations of the reporting requirements. Civil penalties for these violations may be imposed at an amount up to the sum or value not reported. This means the range of penalties will run from small amounts to tens of thousands of dollars. This proposal would require courts to consider Commission policy in determining the proper penalty within that broad range.

Chairman Randolph asked for any questions or comments and added that the reason for pulling proposal #6 was because it was thought that the proposed language would eliminate too many of the audits. Staff is going to go back and redraft the proposal for the next legislative session.

Mark Krausse, Executive Director, mentioned that in proposal #8, chapter 4.6, which is electronic reporting, should be added along with chapter 5, which is Proposition 34. One of the things that the Commission is trying to accomplish is to go potentially to an entirely electronic reporting program where, at least at the state level, the Commission will not have paper reports. Thus it needs the ability to audit those electronic reports.

Commissioner Remy wondered how the electronic filing would impact the proposals under item #3, if the Commission were to begin electronic filing of campaign statements.

Carla Wardlow, Chief of Technical Assistance, responded that currently the statute requires every committee to file a copy if its campaign statement in its county of domicile. However, many committees are not active in the same county where their treasurer is located and the committees use the treasurer's address on their campaign statements. The counties are receiving copies of campaign statements for committees that are not active in that county. This would simply eliminate the requirement to file a copy of your campaign statement in your county of domicile. However, there are situations where candidates, particularly for the legislature, may be domiciled in a county that is different than the county with the largest number of registered voters in their district. The proposal was to continue to have the candidate file in his or her county of domicile. This would eliminate the committee's county of domicile filing and retain the candidate's county of domicile filing.

Mr. Krausse added that once full electronic filing for the state is in place, the statements would be filed only at SOS electronically.

Commissioner Remy suggested that there should be some language that says that once all electronic filing has been reached, filing only one copy will be sufficient.

Chairman Randolph replied that all of that language will come with the implementation of the electronic filing system. Much of the requirements will end up being changed but not until the process is further along.

Commissioner Remy opined that filing the one copy would be permissible if the point of all electronic filing was reached.

Chairman Randolph said that additional language was not necessary.

Commissioner Remy asked regarding item #5, under definition of investments, how defined contributions are handled.

Chairman Randolph asked whether most of the contributions are held in mutual funds and were exempt from disclosure.

Commissioner Huguenin asked if the purpose is to know whether or not it is easy to get an amount, because for the statement of economic interest, there needs to be a dollar amount. Calculating the value of a pension requires an analysis of cash value and contributions, whereas for the defined contribution plans, the statement explains the value.

Chairman Randolph confirmed that the answer to the defined contribution plans depends on what the assets are being held in. The staff agreed.

Commissioner Downey brought up item #4 and wondered whether the regulated community thinks the Commission ought to raise the major donor limits.

Colleen McAndrews, of Bell, McAndrews & Hiltachk, LLP, addressed the Commission regarding the major donor threshold. Ms. McAndrews believes the limit should be raised from $10,000 to $25,000, if not higher. Ultimately, the long term goal would be to eliminate major donor reporting entirely. California is the only state in the nation that requires both sides of the transaction, the donor side and the recipient side, to be reported as a mirror. A task force for that was set up a few years ago to develop a uniform code that could be adopted by all states so they would have the level of reporting that California had. The idea of California's major donor system was presented and unanimously rejected by every group. They saw the system as redundant and a trap for donors.

Ms. McAndrews continued with the two justifications for major donor reporting that were presented in 1974 when the PRA was adopted. The first was that it provided redundancy so that if a company gave a contribution and the recipient did not disclose it, the major donor would presumably be following the law and report the donation, thus trapping the recipient in avoiding disclosure. One thing to point out is that in all the years of the PRA there does not appear to have been a single enforcement case of this kind. To the contrary, there has been a huge body of precedent taking up the time of the Commission finding major donors who inadvertently, because often times they are first time donors and do not know the law, violated the law. The reason all of the enforcement is on the major donor side is because inquiring minds take a recipient committee's report to the Secretary of State and when the major donor report is not there, enforcement goes after the donor.

Ms. McAndrews explained the second justification for major donor reporting, which she feels is more valid. Before electronic filing, when there was only paper filing and the Commission wanted to find out who a company donated to, the only way to do it was to go through all of the recipient committee reports and pick out who that company gave to in order to know how they were spending money in politics. With electronic filing and an adequate searchable database that is not doable today. Therefore, the second justification is on its way out.

Ms. McAndrews concluded by recommending that the Commission do away with major donor reports because it would free up resources. It would be worth looking into how much of the resources are devoted to fulfilling this task of generating so much enforcement activity for something that is not providing much to the public in terms of disclosure. Doing away with major donor reporting would alleviate many of the civil liberties issues as well.

Chairman Randolph agreed with the concept of Ms. McAndrews suggestion to do away with major donor reporting but explained that the adequacy of the searchable database needs to be strong at both the state and local levels before it would accommodate all of the public. The second justification seems to be the more important one and the searchable database is for the most part sufficient for the state but not at all for the local activity. Until then, it is important to keep the major donor requirements in place for a while longer. Raising the threshold seems necessary but the Commission is not ready to eliminate the whole requirement.

Ms. McAndrews replied in agreement about having a searchable database for locals and hopefully that will emerge. However, looking at the reports at the local level is not difficult due to the fact that there are so few, given the low number of local races. Anyone can go to individual city's clerk's offices and look at donor reports. It is good that the Commission is willing to raise the limit to $25,000, but due to the Cost of Living Adjustment (COLA) it will be obsolete in a few years in terms of trying to protect a single donor with a single contribution.

Commissioner Downey pointed out that Ms. McAndrews was a Commissioner several years ago and asked what the major donor limit was when she was on the Commission.

Ms. McAndrews said that the major donor limit has not changed in 30 years; it has always been $10,000. It has always been $100 for the itemization for contributions and $100 for the itemization of expenditures. There has really been no change.

Mr. Krausse responded that the limit has increased in the past. It was $5,000 many years ago and was changed in 1984 to $10,000.

Ms. McAndrews said she left in 1983, so it must have been $5,000 during her time on the Commission. She did not recall that it had changed.

Commissioner Blair asked how the Commission decided on $25,000 as the limit.

Mr. Krausse explained that amount needed to be above the Governor's limit so that a single donor to the Governor would not trigger a major donor. The Governor's limit is $22,300 so the Commission could set the limit at $23,000 if it wanted, or anywhere above that. The thinking was that COLA numbers would encroach on the Governor's limit shortly so the Commission's major donor limit would need to be far enough above it.

Chairman Randolph mentioned that another option would be to put an automatic escalator into the proposal but preferably not based on COLA because non-round numbers are not as easy for the public to remember.

Ms. McAndrews added that the drawback to having the limit change periodically is that the changes are difficult for everyone to keep up with.

Commissioner Blair asked if $25,000 is enough for the major donor limit and suggested possibly raising the amount $35,000 so that is will not have to be adjusted again for some time.

Ms. McAndrews replied that she agrees with Mr. Krausse's point that the Commission should at least raise the amount to what major donor reporting will be when there is a searchable database that covers both state and local reporting.

Commissioner Blair asked what Ms. McAndrews would recommend for the limit.

Ms. McAndrews responded that she would put the amount at $30,000 at minimum.

Mr. Krausse added that the difference between $25,000 and $30,000 would not be very significant.

Commissioner Downey reminded the Commission that the legislature has to approve the amount and asked if there was going to be resistance.

Mr. Krausse replied that he has spoken to several groups regarding this matter and there have not been any strong objections.

Chairman Randolph suggested that the Commission set the proposal at $30,000 for right now and see how that amount works.

Mr. Krausse added, regarding how much staff time is being spent on major donor violations, that the Commission is paying a part time political reform consultant to do the entire major donor and late contribution report Streamline Program. Therefore, this is a very efficient use of state resources.

Chairman Randolph thanked Colleen McAndrews for her comments.

Steven Kaufman, of Kaufman Downing, began his comments by noting that he is in agreement with Ms. McAndrews' suggestions regarding major donor reporting and then addressed proposal #9, specifically the private attorney general provisions in the code. Mr. Kaufman supports the staff's suggested changes in proposals (a), (d), and (e) but also thinks that Commission should consider drafting legislation for the changes suggested in (c) and (f) as well. With respect to the notifications in (d), the notifications that might be required of a complainant coming to the Commission, it is important that the language reflect that the notice is a precondition to coming to the Commission or at least a simultaneous notification and some certification provided along with the demand that goes to the Commission so that there can be some record that the potential respondents have been notified.

Mr. Kaufman continued with a reference to the staff memo in the Ryan case needs some clarification because in that case, although there were settlement demands made to the plaintiffs, they were not done until the lawsuit was filed. Therefore, that notification was after the fact. It is suspected that, had most of the people involved received some sort of notification, they would have immediately attempted to resolve the matter with the Commission.

Commissioner Downey confirmed that there were some people who had in fact filed. And those who did not could have resolved that matter at that time.

Mr. Kaufman said that was true and that the notice is important because it does give the option to have a matter resolved through administrative channels or that be resolved to the satisfaction of the defendant and the Commission. For this reason, there needs to be some consideration to the Commission having the ability under proposal (c) to commence an administrative proceeding that would foreclose a private litigant from pursuing a civil action. The reality is that a private litigant could determine, before the Commission would, that someone had violated the law and come to the Commission and request that it act on the violation before the Commission had begun its administrative process. This would circumvent the streamlined enforcement program. The way the language of the statute is currently phrased implies that the Commission would have to make a decision of whether to institute a civil action in order to cut off a private litigant's demand.

Mr. Kaufman added that it is understood that the Commission has to be mindful that private litigants have a right under the act to pursue these claims in the public interest but the situations where perhaps the lawsuits are not done in the public interest need to be addressed as well.

Mr. Kaufman addressed proposal (f), regarding the preemption ability of the Commission when a civil action has been filed. It seems that it is more about intervention than preemption, or both. It should be specified whether the Commission serves as an intervener or if it is just in communication with the court, weighing in on what the appropriate way for handling these matters.

Chairman Randolph responded regarding proposal (f) that there does not seem to be a need to add any language to the statute with regard to the Commission intervening. It is possible that a court would say that the Commission does not have an interest, but most likely the intervention would be permissive.

Mr. Kaufman agreed that the intervention should be permissive but that language stipulating the Commission's right to intervene would ensure that.

Chairman Randolph said she is uncomfortable with the Commission being able to step in after a case has been filed to stop that particular case. It may make sense in some cases but not in all cases.

Mr. Kaufman replied that it would be problematic and that he feels more strongly that the Commission have the ability to take action before the lawsuit is filed in some way other than bring in a civil action.

Chairman Randolph addressed a point made by Ms. McAndrews, which was that limiting the number of demands does not seem to limit the access of a plaintiff to the agency because the limit only applies to 120-day demands, it does not apply to a regular complaint whether formal or informal.

Commissioner Downey said that he agreed with the staff report that limiting the number of civil actions and providing notification would cover all purposes. He expressed concern with too much Commission intrusion.

Mr. Kaufman asked that if everyone agrees on the importance of notification to the respondent, what good will that notification do if there is no ability for that party to resolve a matter with the Commission and avoid the civil action.

Chairman Randolph interjected that it is possible to resolve an administrative matter within a month or two. Secondly, this issue will always be a problem because the way the statute is written says that if the Commission declines to take action, then the person can go forward. There can be any number of reasons why the Commission would decline to take action, one being that the Commission may not think the person is in violation of the law. The Commission may not have time to figure out if there is a violation or maybe the Commission and the plaintiff may not agree on the interpretation of the law.

Mr. Kaufman explained that he is raising the issue regarding people who did not comply with the law and were not aware of it. If those people are notified they have to opportunity resolve the violation administratively within the 120-day time limit. Enabling the Commission to implement an administrative or civil action in the period of time, rather than just a civil action would allow for that process to play itself out.

Commissioner Downey expressed worry about the number of people who will receive notification and not go resolve the issue.

Commissioner Blair sought to clarify the possibilities that exist for those people sued. First, those who did actually file would submit their report that the suit would be over. The second possibility is that those who did not report would realize the violated the law and submit a report to resolve the suit. And last, there would be those who realize they violated the law and choose to ignore the suit. In the first option, the plaintiff is not punished for the violation because it turns out they did actually report their contributions. In the second instance, the person would realize their mistake and correct it, but they could still get sued.

Chairman Randolph said that Commissioner Blair is correct and added that one of the issues is figuring out what it would mean to have the Commission commence an administrative action. It could mean the preparation of a PC report or the holding of PC hearing. The decision needs to be made to decide at what point the Commission has commenced an administrative action.

Mr. Kaufman replied that he would consider the serving of a PC report or presenting the streamlined stipulation settlement to the party as the Commission having commenced an administrative action.

Chairman Randolph said that the requirement could be coupled to include commencement of an administrative action within 120-days and if that action is not completed within 24 months, the right to civil action becomes an option.

Commissioner Remy opined that the Commission ought to consider adding proposal (c) to allow for more latitude and flexibility.

Chairman Randolph explained that the process of drafting the proposal and putting through legislation allows for plenty of opportunity to make changes so it can be added to the Commission direction to consider some version of (c).

Commissioner Downey expressed reluctance in considering too many options. The proposal looks sufficient as is.

Chairman Randolph suggested the Commission go through the items one at a time to get a sense of where the Commission stands on each as of now. The Commission is comfortable with a limit on the numbers of lawsuits that can be filed, the notification concept, the notion of directing the course to consider Commission policy, and the Commission's right to intervene in a PRA lawsuit. Regarding the inclusion of a proposal that would allow the Commission to commit to handling a case administratively, Chairman Randolph asked if there would be opportunity to spend more time drafting specific language.

Mr. Krausse said there was plenty of time to consider the process.

Chairman Randolph asked if there were any other proposals on the list that should be discussed.

There were none.

Commissioner Downey moved to approve proposals 1-5, and 7-9. Commissioner Downey seconded the motion. Commissioners Downey, Blair, Huguenin, Remy, and Chairman Randolph supported the motion, which carried a 5-0 vote.

Item #9. Executive Director's Report.

Mark Krausse had nothing additional to add. Regarding previous discussion on electronic filing at the local level that would get the Commission to a point where it could do away with major donor reporting.

Chairman Randolph added that the Commission will discuss the task force recommendations next month in more detail.

Commissioner Blair asked it the reason for not having electronic filing available yet was due to software issues or the cost of the technology.

Chairman Randolph said that it was also a management funding issue. The technology is there but harnessing it effectively is an issue.

Item #10. Litigation Report.

Luisa Menchaca reported that there was nothing to add.

Chairman Randolph adjourned the meeting to closed session.

Closed session ended at 12:37 p.m.

Chairman Randolph reported that no reportable action was taken in this meeting.

The meeting adjourned at 12:40 p.m.

Dated: November 3, 2005

Respectfully submitted,

_____
Kelly Nelson
Commission Assistant

Approved by:

_____
Liane Randolph
Chairman